Supreme Court, U.S.
FILED
(1) 011249 FEB 19 2002

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

HEATHER LONG WARRIOR,
Petitioner

v.

MICHAEL BOXX,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

D. MICHAEL EAKIN
Counsel of Record
Montana Legal Services
P.O. Box 3093
2442 First Ave. North
Billings, MT 59103
(406) 248-7113

Attorneys for Petitioner

3588

QUESTION PRESENTED

1. Must a tribal court defendant exhaust tribal remedies prior to initiating a challenge to tribal court jurisdiction in the federal courts when the action arises out of a private consensual relationship with a tribal member?

2. Does a tribal court have jurisdiction over a cause action between a tribal member and a non-Indian arising from a private consensual social relationship?

II

PARTIES

The parties to this action are those named in the caption. Petitioner knows of no other parties.

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdictional Statement	2
Statutes involved	2
Statement of the Case	2
Reasons to Grant Certiorari	3
Conclusion	10
Appendix A	1a
Appendix B	14a
Appendix C	20a

TABLE OF AUTHORITIES

Bowen v. Doyle, 230 F.3d 525 (2nd Cir. 2000) 4

Brown v. Washoe Housing Authority, 835 F.2d 1327 (10th Cir. 1987) ... 4

El Paso Natural Gas v. Neztsosie, 526 U.S. 473 (1999) 4

Ex Parte Mayfield, 141 U.S.197 (1891) 9

Iowa Mutual Ins. Co v. LaPlante, 480 U.S. 9 (1987) 3

Montana v. United States, 450 U.S. 544 (1981) 7,8,9,10

National Farmers Union Ins. Co. v. Crow Tribe, 471 U.S. 845 (1985) 3,4,5

Nevada v. Hicks, ____ U.S. ____, 121 S.Ct. 2304 (2001) 5.7.8.10

Ninigret Development Corporation v. Narragansett Indian Wetuomuck Housing Authority, 207 F.3d 21 (1st. Cir. 2000) 4

Progressive Northwestern Ins. Co. v. Nielsen, ____ F. Supp. ____, 2002 U.S. Dist. Lexis 923 (D.N.D. 2002) 6
Railroad Commission v. Pullman Co., 312 U.S. 496 (1941) 5
Sanders v. Robinson, 864 F.2d 630 (9th Cir. 1988) 9
Strate v. A-1 Contractors, 520 U.S. 428 (1997) 4
Tamiami Partners, Ltd. v. Miccosukee Tribe, 999 F.2d 503 (11th Cir. 1993) 4
Weeks Construction v. Oglala Sioux Housing Authority, 797 F.2d 668 (8th Cir. 1986) 4
Wellman v. Chevron USA, Inc., 815 F.2d 577 (9th Cir. 1987) 4

Constitution and statutes:

U.S. Const Art. I, Sec. 8, cl. 3 (Indian Commerce Clause) 9
U.S. Const. Art. VI, cl 2 (Supremacy Clause) 9
25 U.S.C. 1901 (Indian Child Welfare Act) 9
28 U.S.C. 1738B 9
28 U.S.C 1738C 9

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2001

No.

HEATHER LONG WARRIOR, Petitioner

v.

MICHAEL BOXX, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Heather Long Warrior respectfully petitions for a writ of certiorari to review the judgment of United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The amended opinion of the Court of Appeals for the Ninth Circuit (App., *infra* at 1a-13a) is reported at 265 F.3d 771. The opinion of the district court (App., *infra* at 14a -19a) is unreported .

JURISDICTION

The judgment of the court of appeals was entered on September 6, 2001. A petition for rehearing was filed and the court of appeals amended its opinion. App., *infra*, 1a. With the amendment of the original opinion, the petition for rehearing was denied. App., *infra*, 20a-21a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The question presented, the need to exhaust tribal court remedies and the extent of tribal jurisdiction, are questions of federal common law. No statutes are involved.

STATEMENT

Petitioner Heather Long Warrior, a member of the Crow Tribe, and Respondent Michael Boxx, a non-Indian, entered into a private consensual relationship, an agreement to go for a drive in Boxx's pickup truck. The drive took them on a federal right-of-way on a road on the Crow Indian Reservation. During the course of the drive the pickup truck left the road and rolled over, causing injuries to Long Warrior.

Long Warrior filed an action in the tribal court alleging that Boxx's negligence was the cause of her injuries. Boxx moved to dismiss. Prior to a ruling from the tribal court, Boxx also filed an action in the federal district court seeking to enjoin Long Warrior from pursuing the action in tribal court.

The tribal trial court dismissed the tribal action for

want of jurisdiction and the federal district court dismissed the federal action as moot. Long Warrior appealed to the tribal court of appeals. Upon motion of Boxx, the federal district court vacated its dismissal and entered an order enjoining Long Warrior from proceeding with the appeal in the tribal appellate court, holding that exhaustion of tribal remedies is not necessary and that the tribe lacked jurisdiction. Long Warrior appealed that decision to the Ninth Circuit which affirmed the district court.

REASONS FOR GRANTING THE PETITION

I. The decisions of this Court have led to confusion on the need to exhaust tribal remedies.

This Court formulated the Indian abstention doctrine in *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845 (1985), holding that tribal courts should have the first opportunity to rule on tribal jurisdiction. The abstention envisioned in *National Farmers Union* requires that a party first exhaust tribal remedies prior to bringing a federal action to challenge a tribe's exercise of jurisdiction over a non-Indian. This Court reaffirmed the abstention doctrine two years later in *Iowa Mutual Ins. Co v. LaPlante*, 480 U.S. 9 (1987), holding that the basis of federal jurisdiction, whether it be federal question or diversity, did not affect the policies supporting exhaustion of tribal remedies. This Court wanted to prevent liberal access to a federal forum that would result in the federal courts being in direct competition with the tribal courts.

The abstention doctrine was quickly embraced by the circuit courts of appeals. *Ninigret Development Corporation v. Narragansett Indian Wetuomuck Housing Authority,* 207 F.3d 21 (1st. Cir. 2000); *Bowen v. Doyle*, 230 F.3d 525 (2nd Cir. 2000)(enjoining state court proceedings prior to exhaustion of tribal remedies); *Wellman v. Chevron USA, Inc.*, 815 F.2d 577 (9th Cir. 1987); *Brown v. Washoe Housing Authority*, 835 F.2d 1327 (10th Cir. 1987); *Tamiami Partners, Ltd. v. Miccosukee Tribe,* 999 F.2d 503 at 508 (11th Cir. 1993); *see also, Weeks Construction v. Oglala Sioux Housing Authority,* 797 F.2d 668 at 674 (8th Cir. 1986). The circuits saw that the exhaustion not only conserved federal judicial resources, but also furthered the Congressional policy of allowing the tribes a greater voice in their own governance.

National Farmers Union recognized three exceptions to the exhaustion requirement, when there was a clear jurisdictional prohibition, when exhaustion was futile, or when the party invoking tribal jurisdiction does so in bad faith. *Id.* 471 U.S. at 856, n. 21.

In *Strate v. A-1 Contractors*, 520 U.S. 428 (1997), even though the parties had exhausted tribal remedies (Id. At 444), this Court intimated in a footnote that the exhaustion rule may contain another exception, when the lack of tribal jurisdiction is "plain." *Strate* at 459, n.14.

Two years after *Strate*, this Court again had the opportunity to address exhaustion doctine. In *El Paso Natural Gas v. Neztsosie*, 526 U.S. 473 (1999) this Court held that the federal statute providing for exclusive federal jurisdiction over nuclear waste lawsuits

preempted tribal jurisdiction and obviated the need for exhaustion of tribal remedies. While so holding, this Court, again in a footnote, noted that the exceptions to the rule requiring exhaustion of tribal remedies would be rare. *Neztsosie,* 526 U.S. at 485, n. 7.

This last term, this Court again commented on the exhaustion requirement, citing with approval the language from *Strate* that exhaustion is not required when the lack of jurisdiction is "plain." *Nevada v. Hicks*, ____ U.S. ____, 121 S.Ct. 2304 at 2315 (2001). As in *Strate*, the parties in *Hicks* had provided the tribal appellate court an opportunity to address the various jurisdictional issues. *Id.* at 2308.

While the exhaustion rule is prudential and not jurisdictional (Compare *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941)), the various decision on Indian abstention have given little guidance on how the federal courts are to exercise their discretion.

In short, since first enunciating the Indian abstention doctrine in *National Farmers Union*, this court has had four opportunities to comment on the need to exhaust tribal remedies. In two cases, exhaustion was found to be a viable rule. In two cases in which tribal appellate courts had the opportunity to rule on jurisdiction, comments were made that exhaustion is not required when the lack of jurisdiction is "plain." Because of the seemingly contradictory stances of these cases, a grant of certiorari in this case is appropriate to clear the confusion.

II. The Circuits are split on the issue of exhaustion of tribal remedies.

As might be expected with conflicting signals coming from this Court, the circuit courts of appeals are split on the issue of when exhaustion of tribal remedies is required. Since the decision in *Strate*, three circuits have had the opportunity to address the issue of exhaustion of tribal remedies. The first and second circuits have found that exhaustion of such remedies is still required if a colorable claim of tribal jurisdiction is made. *Ninigret Development Corporation v. Narragansett Indian Wetuomuck Housing Authority, supra*; *See also, Bowen v. Doyle, supra*. (State courts should abstain pending exhaustion of tribal remedies.) The Ninth Circuit, on the other hand, decides the merits of the jurisdictional claim and indicates that exhaustion is only required when a tribe has jurisdiction.. (Because we conclude that the tribal court lacks jurisdiction over this claim, exhaustion is not required. 265 F.3d at 776 , App at. 12a) A district court in the Eighth Circuit has chosen to follow the First circuit and the "colorable claim" standard, even in an automobile accident case. *Progressive Northwestern Ins. Co. v. Nielsen,* ____ F. Supp. ____, 2002 U.S. Dist. Lexis 923 (D.N.D. 2002). The district court noted a lack of directive in determining when a "colorable claim" has been made. (Though it has been unable to locate any clear definition, the Court takes a "colorable claim" of jurisdiction to be one sufficient to raise a legitimate question for the tribal court - a plausible or reasonable claim.). Id at 8.

Certiorari should be granted to remedy the split in the

circuit courts of appeal and the district courts.

III. The decision below is in conflict with *Hicks* and traditional concepts of Indian Law.

The seminal case concerning tribal jurisdiction over non-Indian is *Montana v. United States*, 450 U.S. 544 (1981) In that action this Court held that Tribes normally do not have jurisdiction over non-Indian with two notable exceptions:

> Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of non-members who enter into consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements [citations omitted]. A tribe may also retain power to exercise civil authority over conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Montana, 450 U.S. at 565 -566.

Nevada v. Hicks, supra, expounded on the first exception, the consensual relationship exception. *Hicks* holds that there needs to be a private consensual relationship between the tribal court plaintiff and a non-Indian defendant in order for a tribal court to properly assert jurisdiction over a non-Indian. *Hicks,* 121 S.Ct. at

2310, n.3. In this case the circuit court acknowledged that there was a private consensual relationship between Boxx and Long Warrior. (265 F.3d at 776, App. at 8a)(It is true that Long Warrior's relationship with Boxx was consensual.) The Ninth Circuit held, however, that a private consensual **social** relationship, is not the type that would justify the exercise of tribal jurisdiction. This conclusion was reached by reading the tests established in *Montana* as statutes rather than an opinion in that particular case. By doing a statutory construction analysis of the language in *Montana*, the circuit court reasoned that only **business** relationships qualify as allowing a tribe to exercise jurisdiction. If this Court had been enacting legislation, then perhaps the examples given in *Montana* would be limiting. However, the test in *Montana* is in a judicial opinion, not a statute enacted by Congress. See, *Hicks* 121 S.Ct. at 2316-2317. (To be sure, *Montana* is "an opinion . . . not a statute," and therefore it seems inappropriate to speak of what the *Montana* Court intended the first exception to mean in future cases.) The concurrence was even more direct. (The Court's decision in *Montana* did not and could not have resolved the complete scope of the first exception.) O'Connor concurring *Id.* at 2327. The Ninth Circuit overlooked this portion of *Hicks* and held *Montana* does set out the complete scope of the first exception.

The limit on tribal jurisdiction over non-Indians is essentially a Supremacy Clause issue. The tribes' inherent jurisdiction has been impliedly limited by various treaties, statutes, and their status under the Constitution. Undeniably the tribes must bow the

supremacy of the federal law limiting their jurisdiction. U.S. Const. Art. VI, Cl. 2. However, there is nothing that would indicate that the Supremacy Clause would allow tribes to exercise jurisdiction over actions arising from business relationships but not actions arising from social relationships. Tribes have traditionally been allowed much greater latitude in governing social relationships. *See*, *Ex Parte Mayfield*, 141 U.S.197 (1891); *Sanders v. Robinson*, 864 F.2d 630 (9th Cir. 1988); Indian Child Welfare Act, 25 U.S.C. 1901 et seq.; 28 U.S.C. 1738B (Full Faith and Credit for Child Support Orders); 28 U.S.C. 1738C (Defense of Marriage Act). Indeed, one basis for limiting tribal jurisdiction is the Indian Commerce Clause, U.S. Const. Art. I, §8, cl. 3. The Constitution expressly recognizes federal power to regulate business relationships between Indians and non-Indians, and impliedly limits tribal jurisdiction by doing so. There is no express constitutional provision concerning social relationships between tribes and non-Indians.

It should also be noted that social relationships are truly voluntary while business relationships often are not. A non-Indian living in an isolated community with one tribally owned store and gas station may have little choice as to where to take one's business. Similarly, if an allotment of trust land sits in the middle of other land owned or lease by a non-Indian rancher, there may be little choice from whom to lease land. But even when there is little choice in business dealings, one still has the ability to decide with whom to socialize in one's free time. If one of the elements in the *Montana* test is

whether the non-Indian has entered into a voluntary relationship with a tribal member, a social relationship meets the test much more so than does a business relationship.

The circuit court's conclusion that this Court limited the first *Montana* exception to business relationships is inconsistent with *Hicks*. It is appropriate to allow the tribal courts the first opportunity to determine if a particular voluntary relationship meets the first *Montana* exception. However, if this Court determines that exhaustion is not required, it should grant certiorari to reverse the determination that the *Montana* exception is limited to business relationships.

CONCLUSION

The decisions of this court have delivered conflicting signals as to the need of a litigant to exhaust tribal remedies. This has led to a split in the circuits on when exhaustion is required. A grant of certiorari in this action could give the opportunuty to give clear direction on the Indian exhaustion doctrine.

Respectfully submitted.

D. MICHAEL EAKIN
Attorney for Petitioner

February 2002

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-35073

MICHAEL BOXX, Plaintiff-Appellee
vs.
HEATHER LONG WARRIOR, Defendant-Appellant

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA

[Filed November 20, 2001]

Before: Pregerson, Tashima, and Thomas, Circuit Judges

OPINION

TASHIMA, Circuit Judge:

I.

Heather Long Warrior, a member of the Crow Tribe, and Michael Boxx, a non-Indian, are social acquaintances. While at a party, after enjoying some alcoholic libations,

they decided to go for a drive in Boxx's truck. While traveling on Ok-E-Beh Road, the truck rolled off the road, injuring Long Warrior. Ok-E-Beh Road, although it is on the Crow Reservation, is considered to be "non-Indian fee land." As a result, Long Warrior sued Boxx for her injuries in tribal court.

Shortly after Long Warrior filed her action in tribal court, Boxx filed a motion to dismiss that action. Before the tribal court decided his motion to dismiss, however, Boxx also filed this action in the federal district court to enjoin Long Warrior from pursuing the tribal court action. In the federal action, Boxx filed a motion for summary judgment and, in turn, Long Warrior moved to dismiss the federal action, contending that exhaustion in tribal court was required. While these motions were pending in district court, the tribal court granted Boxx's motion to dismiss for lack of jurisdiction. Consequently, without ruling on either party's motion, the district court dismissed Boxx's action as moot, without prejudice.

Long Warrior, however, appealed the tribal court's decision to the Tribal Court of Appeals. As a result of that appeal, Boxx filed a motion to amend the district court's order dismissing without prejudice, and asked for summary judgment because the appeal to the Tribal Court of Appeals required that he defend the underlying tort action, even though jurisdiction was lacking. The district court agreed with Boxx and entered judgment in his favor. In so doing, it concluded that Boxx was not required to exhaust tribal remedies and that, under *Strate v. A-1 Contractors*, 520 U.S. 438, 137 L. Ed. 2d 661, 117 S. Ct 1404 (1997), and *Montana v. United States*, 450 U.S. 544, 67 L. Ed. 2d 493, 101 S. Ct. 1245 (1981), the tribal court lacked jurisdiction over the underlying action. Long

Warrior appeals.

Long Warrior argues that under existing precedent, exhaustion is required. Although she concedes that there are exceptions to the exhaustion requirement, she contends that this case does not fall within any of them. She also argues that, whether or not exhaustion is required, the district court erred in holding that the tribal court lacked jurisdiction. She contends that Congress specifically delegated to the tribes the authority to adjudicate these kinds of actions and that even if it did not, the tribal court still had jurisdiction over Long Warrior's action under Montana's two exceptions. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm. We review the district court's grant of summary judgment de novo. *Balint v. Carson City*, 180 F.3d 1047, 1050 (9th Cir. 1999) (en banc).

II.

In *Montana*, the Supreme Court held that where there is no intervention of treaty or federal law, a tribe has only limited civil regulatory authority, [*4] i.e., legislative jurisdiction, over non-tribal members for activities on reservation land alienated to non-Indians (non-Indian fee land). *Montana*, 450 U.S. at 563, 65. This limited civil regulatory authority includes the right to

> regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands

> within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

450 U.S. at 565, 66 (internal citations omitted).[1]

A.

Long Warrior argues that two federal statutes authorize the Crow Tribe to entertain civil suits involving highway accidents caused in part by alcohol consumption. The two statutes, 25 U.S.C. § 2401 and 18 U.S.C. § 1161, however, cannot bear that weight. First, § 2401 is not a delegation of authority, but a list of congressional findings supporting Congress' enactment of laws unrelated to the tribes' authority to regulate or adjudicate alcohol-related highway accidents. See generally 25 U.S.C. §§ 2411-2455.[2]

---

[1] Athough *Montana* only spoke of regulatory authority, *Strate* made it clear that a tribe's adjudicatory jurisdiction could not exceed its legislative one. *Strate*, 520 U.S. at 453; *Burlington N.R.R. Co. v. Red Wolf*, 196 F.3d 1059, 1062 (9th Cir.), cert. denied, 529 U.S. 1110, 146 L. Ed. 2d 795, 120 S. Ct. 1964 (2000).

[2] As stated in 25 U.S.C. § 2402, the statement of purpose, §§ 2411 through 2455, was not intended to grant Indians any authority over alcohol-related accidents. Rather, the purpose of the statute was to:

> (1) authorize[]and develop a

Therefore, Congress did not expressly authorize jurisdiction in tribal courts for personal injury actions involving alcohol. 18 U.S.C. § 1161 fares no better.

> comprehensive, coordinated attack upon the illegal narcotics traffic in Indian country and the deleterious impact of alcohol and substance abuse upon Indian tribes and their members,
>
> (2) provide needed direction and guidance to those Federal agencies responsible for Indian programs to identify and focus existing programs and resources, including those made available by this chapter, upon this problem, %
>
> (3) provide authority and opportunities for Indian tribes to develop and implement a coordinated program for the prevention and treatment of alcohol and substance abuse at the local level, and
>
> (4) to modify or supplement existing programs and authorities in the areas of education, family and social services, law enforcement and judicial services, and health services to further the purposes of this chapter.

25 U.S.C. § 2402.

Contrary to Long Warrior's argument, § 1161 does not vest tribal courts with jurisdiction over alcohol-related personal injury lawsuits. Rather, as explained by the Supreme Court in *United States v. Mazurie*, 419 U.S. 544, 42 L. Ed. 2d 706, 95 S. Ct. 710 (1975), § 1161 merely allows "Indian tribes, with the approval of the Secretary of the Interior, to regulate the introduction of liquor into Indian country, so long as state law was not violated." *Id.* at 547 (emphasis added). Therefore, neither of the sections relied on by Long Warrior confers upon tribal courts the right to adjudicate the suit at hand.

B.

Long Warrior also claims that the tribal court has jurisdiction over this action because the Crow Tribe retained a gatekeeping right over Ok-E-Beh Road. This argument is meritless. A right-of-way over Ok-E-Beh Road, where the accident took place, was granted to the United States National Park Service "for road purposes in perpetuity, including, without limitation by reason of enumeration, the right to construct, maintain and use road, road turnoffs, scenic view areas and parking areas." A tribe cannot assert a gatekeeping right if, as here, it has lost the "landowner's right to occupy and exclude." Strate, 520 U.S. at 456. A plain reading of this right-of-way leads to the inescapable conclusion that the Crow Tribe "'expressly reserved no right to exercise dominion or control over the right-of-way.'" *County of Lewis v. Allen*, 163 F.3d 509, 514 (9th Cir. 1998) (quoting *Strate*, 520 U.S. at 456). Therefore, "the tribe[] 'retained no gatekeeping right.'" Id. (quoting *Strate*, 520 U.S. at 456). On the contrary, the tribe reserved only "the right to graze

such portions of the lands covered by said right-of-way [*8] as are not then developed for said road purposes, together with the right to construct and use thereon access roads to owners' remaining lands at points mutually acceptable. ..." Moreover, whether or not section 3-2-203 of the Crow Tribal Code purports to confer jurisdiction on the Tribe for activities on Ok-E-Beh Road, "having ceded that right, the tribe cannot now assert tribal jurisdiction over non-Indians ... for activities arising directly out of the arrangement." Id.; cf. *South Dakota v. Bourland*, 508 U.S. 679, 689, 124 L. Ed. 2d 606, 113 S. Ct. 2309 (1993) (regarding reservation land acquired by the United States for operation of a dam and reservoir, tribe's loss of "right of absolute and exclusive use and occupation ...implies the loss of regulatory jurisdiction over the use of the land by others").

C.

Having failed to point to any treaty or statute authorizing the Crow Tribe "to entertain highway-accident tort suits of the kind [Long Warrior] commenced against[Boxx,] ... [Long Warrior] must show that [her] tribal-court action against [a] nonmember[] qualifies under one of Montana's two exceptions." *Strate*, 520 U.S. at 456. Under the first Montana exception, a tribe may regulate, and thus adjudicate, "activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana*, 450 U.S. at 565. Long Warrior contends that because her relationship with Boxx is consensual, albeit socially consensual, jurisdiction here is proper. We reject this argument.

It is true that Long Warrior's relationship with Boxx was consensual. But that is only half of the equation. Under *Montana*, the relationship must be both consensual and entered into "through commercial dealings, contracts, leases, or other arrangements." Id. In interpreting that language, courts have inferred that "qualifying relationships" only arise from some form of commercial transaction. The Supreme Court reasoned that:

> *Montana*'s list of cases fitting within the first exception, see 450 U.S., at 565, 566, indicates the type of activities the Court had in mind: *Williams v. Lee*, 358 U.S. 217, 223, 3 L. Ed. 2d 251, 79 S. Ct. 269 (1959) (declaring tribal jurisdiction exclusive over lawsuit [*10] arising out of on-reservation sales transaction between nonmember plaintiff and member defendants); *Morris v. Hitchcock*, 194 U.S. 384, 48 L. Ed. 1030, 24 S. Ct. 712 (1904) (upholding tribal permit tax on nonmember-owned livestock within boundaries of the Chickasaw Nation); *Buster v. Wright* ,135 F. 947, 950 (C. A. 8 1905) (upholding Tribe's permit tax on nonmembers for the privilege of conducting business within Tribe's borders; court characterized as "inherent" the Tribe's "authority ... to prescribe the terms upon which noncitizens may transact business within its borders"); *[Washington v. Confederated Tribe of the] Colville [Indian Reservation]*, 447 U.S. 134, 152, 154 [(1980)] (tribal authority to tax on-reservation cigarette sales to nonmembers

> "is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status").

Strate, 520 U.S. at 457; cf. *Allstate Indem. Co. v. Stump*, 191 F.3d 1071, 1076 (9th Cir. 1999) ("It appears to us that the dispute arises not from the parties' contractual relationship, as the first *Montana* exception requires, but from alleged conduct governed by [state law]."). We reaffirm this principle today. Under *Montana's* first exception, a relationship is of the qualifying kind only if it is both consensual and entered into through commercial dealing, contracts, leases, or other arrangements. To the extent that the relationship cannot be neatly categorized as one entered through commercial dealing, contracts, or leases, but is instead characterized as one entered through "other arrangements," we conclude that such arrangements also must be of a commercial nature. Hence, although we do not provide an exhaustive list of qualifying relationships under Montana's first exception, we hold that the relationship at issue in this case, which is a personal one, is not of the qualifying kind.[3]

---

[3] Long Warrior's reliance on *Sanders v. Robinson*, 864 F.2d 630 (9th Cir. 1988), is misplaced. First, Sanders is a domestic relations case, and domestic relations has long been an area excepted from federal jurisdiction. See *Ankenbrandt v. Richards*, 504 U.S. 689, 693, 119 L. Ed. 2d 468, 112 S. Ct. 2206 (1992). Second *Sander's* holding that tribal courts had jurisdiction over dissolution proceedings of that marriage was based on

D.

Long Warrior also contends that Montana's second exception is implicated in this case. Namely, she contends that the conduct she seeks relief for "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe" because alcohol-related accidents are of great concern to the Crow Tribe, as evidenced by Congress's enactment of 25 U.S.C. § 2401. *See Montana*, 450 U.S. at 565. But this is not what is at issue here. The action in tribal court does not seek to enforce or control the distribution or consumption of alcohol on the reservation. Rather, it seeks damages for negligence. As the Supreme Court has held: "Undoubtedly, those who drive carelessly on a public highway running through a reservation endanger all in the vicinity, and surely jeopardize the safety of tribal members. But if *Montana's* second exception requires no more, the exception would severely shrink the rule." *Strate*, 520 U.S. at 457-58[4].

---

the fact that the family unit (the couple and their children) resided on the reservation and that all three children were members of the tribe. Thus, Sanders has no application to the casual relationship in the case at bench.

4

Nor is Long Warrior's status as a member of the Crow Tribe enough to confer jurisdiction on the tribal court. As explained in *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997), the tribal court plaintiff's status as a

Even assuming that the presence of alcohol distinguishes this case from precedent, the second exception cannot possibly confer jurisdiction on the tribal courts here. Although framed in broad terms, Montana's second exception is narrowly construed. *County of Lewis*, 163 F.3d at 515. The "cases cited in Montana indicate the character of the tribal interest the Court envisioned." *Strate,* 520 U.S. at 458. In analyzing those cases, the Court concluded that in order for a case to fall within the second exception, either "regulatory []or adjudicatory authority over the ... highway accident at issue is needed to preserve the right of reservation Indians to make their own laws and be ruled by them." *Id.* at 459 (internal quotation marks omitted). *Strate*, then, puts the exception in its proper context:

> Read in isolation, the Montana rule's second exception can be misperceived. Key to its proper application, however, is the Court's preface: "Indian tribes retain their inherent power [to punish tribal offenders,] to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of [*14] inheritance for

---

tribal member alone cannot satisfy the second exception. *Id.* at 815. Rather, "to invoke the second Montana exception, the impact must be 'demonstrably serious and must imperil the political integrity, the economic security, or the health and welfare of the Tribe.'" Id. (quoting *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 431, 106 L. Ed. 2d 343, 109 S. Ct. 2994 (1989)).

> members.... But [a tribe's inherent power does not reach] beyond what is necessary to protect tribal self-government or to control internal relations."

County of Lewis, 163 F.3d at 515 (quoting *Strate*, 520 U.S. at 459).

Here, the underlying tort action is certainly not needed to preserve such rights. Even assuming that the Tribe possesses some regulatory and adjudicatory power over the sale and consumption of alcohol, the Tribe is not prevented in any way from exercising such authority by being denied the right to adjudicate this garden variety automobile accident. If we were to find jurisdiction here, "the exception would swallow the rule because virtually every act that occurs on the reservation could be argued to have some ... welfare ramification to the tribe." Id. We hold, therefore, that the tribal court lacks jurisdiction over Long Warrior's personal injury action.

E.

Because we conclude that the tribal court lacks jurisdiction over this claim, exhaustion is not required. *Nevada v. Hicks*, 150 L. Ed. 2d 398, 121 S. Ct. 2304, 2315 (2001) ("Since it is clear ...that tribal courts lack [*15] jurisdiction ..., adherence to the tribal exhaustion requirement in such cases 'would serve no purpose other than delay,' and is therefore unnecessary."); *Burlington Northern*, 196 F.3d at 1065-66 ("exhaustion is not required when 'tribal court jurisdiction does not exist under Montana and Strate,' and remand would only delay a final judgment").

III.

In conclusion, neither the federal statutes relied on by Long Warrior nor Montana's exceptions provide for tribal court jurisdiction in this case. As the Court stated in Strate, Long Warrior may pursue her case against Boxx

> in the state forum open to all who sustain injuries on [Montana's] highway. Opening the Tribal Court for her optional use is not necessary to protect tribal self-government; and requiring [Boxx] to defend against this commonplace ... highway accident claim in an unfamiliar court is not crucial to "the political integrity, the economic security, or the health and welfare of the [Crow Tribe]."

Strate, 520 U.S. at 459 (quoting *Montana*, 450 U.S. at 566) (footnotes omitted).

The judgment of the district court is AFFIRMED.

APPENDIX B
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

Cause No. CV98-183 BLG-JDS

MICHAEL BOXX, Plaintiff,

vs.

HEATHER LONG WARRIOR, Defendant.

ORDER

This matter comes before the Court on plaintiff's motion to amend order and judgment.

On August 19, 1999 the Court dismissed this action without prejudice as moot because the Crow Tribal Court determined it lacked jurisdiction of the underlying tort claim between the parties, *Long Warrior v. Boxx,* Crow Tribal Case No. CV 97-241. Because defendant Long Warrior appealed the Crow Tribal Court decision, plaintiff Boxx asks that the judgment of dismissal without prejudice be withdrawn and summary judgment be entered in his favor because he continues to have to defend the underlying tort action in tribal court.

It is appropriate to grant a motion under Rule 59(e) when the court is presented with newly discovered evidence, when the court has committed clear error or the judgment is manifestly unjust, or when there is an intervening change in the controlling law. *School Dist. No. 1J v. ACandS, Inc.,* 5 F.3d 1255, 1263 (9th Cir. 1993), *cert. denied,* 512 U.S. 1236 (1994). Rule 59(e) provides

an efficient mechanism by which a trial judge can correct an otherwise erroneous judgment without implicating the appellate process. *Clipper Exxpress* (sic) *v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240. 1249 (9th Cir. 1982), *cert. denied,* 459 U.S. 1227 (1983). Because the tribal action is still pending the court shall vacate the judgment entered on August 19, 1999.

Defendant Heather Long Warrior is an enrolled member of the Crow Tribe. Plaintiff Michael Boxx is not a tribal member. Long Warrior filed a lawsuit in the Crow Tribal Court, under Cause No. CV 97-241. Long Warrior alleged that on October 27, 1996 she was a passenger in a pickup owned and driven by Boxx and that as a result of Boxx's negligence, she was injured in a wreck just outside the Fort Smith village, within the exterior boundaries of the Crow Indian Reservation, on a roadway right-of-way granted to the United States.

The United States constructed and has maintained the road at issue. Prior to the construction of the road, the United States purchased from the Crow Tribe a perpetual road right-of-way on the land upon which the road is built. The plat of the road right-of-way across Indian lands, evidencing the right-of-way, was filed with the Big Horn County Clerk and Recorder's Office on March 7, 1968. The right-of-way is 3.97 miles in length. The car accident in question occurred within the roadway right-of-way granted to the United States.

Plaintiff Boxx, a non-tribal member, moves for summary judgment on the grounds that the Crow Tribal Court does not have jurisdiction over him based upon *Strate v. A-1 Contractors*, 117 S.Ct. 1404 (1997), *Wilson v. Marchington*, 127 F.3d 805 (1997) (accident on U.S. Highway 2 within the exterior boundaries of the Blackfeet

Reservation) and *Austin's Express v. Dust*, CV 97-133 BLG-JDS, (accident on Interstate 90 within the exterior boundaries of the Crow Reservation).

In support of her own motion to dismiss and in opposition to the motion for summary judgment, Long Warrior first argues that Boxx has failed to exhaust his tribal remedies. For exhaustion purposes this case is virtually indistinguishable from *Strate, Wilson* and *Austin's Express*, which all hold that when tribal court jurisdiction over actions such as this one is challenged in federal court, the otherwise applicable exhaustion requirement must give way, for it would serve no purpose other than delay. Accordingly, the Court shall deny the motion to dismiss.

The court notes that Long Warrior does not dispute Boxx's conclusion that the roadway right-of-way is the equivalent to nonmember fee land for nonmember governance purposes. Nor could she do so successfully in light of *Strate, Wilson*, and *Austin's Express*, which all found highway rights-of-way to be the equivalent of nonmember fee land.

Absent express authorization by federal statute or treaty, Indian tribes lack civil authority over the conduct of non-members on non-Indian land, or is (sic) equivalent, within the exterior boundaries of a reservation. See, *Strate v. A-1 Contractors*, 117 S.Ct. at 1409; *Montana v. United States*, 101 S.Ct. at 1257-58. However:

> Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of non-members who enter into consensual relationships

> with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements [citations omitted]. A tribe may also retain power to exercise civil authority over conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Montana, 101 S.Ct. 1258.

Long Warrior claims that the Crow Tribal Court has jurisdiction to adjudicate her tort action because she and Boxx had a consensual"social relationship." As plaintiff points out, however, a tribe's civil authority extends only to "commercial dealing, contracts, leases or other arrangements" between nonmembers and the tribe and its members. There is no indication from *Montana* and its progeny that this exception to the general rule is intended to apply outside of commercial arrangements.

Recently, in *Big Horn County Electric v. Adams*, CV 98-43-BLG-JDS, this Court held that "even on fee land or its equivalent, a tribe's civil authority extends only to regulation of the particular conduct, activity, or trade that gives rise to the consensual relationship between the tribe and the non-member." *Big Horn County Electric v. Adams*, CV 98-43-BLG-JDS (Order of June 29, 1999, pp. 4 and 5). Even assuming that Boxx and Long Warrior's "social relationship"qualifies as a consensual relationship for the purposes of nonmember governance, it still does afford the Crow Tribal Court jurisdiction over Long Warrior's tort claim because the tribal court is not regulating the conduct, activity or trade which gave rise to the consensual relationship. This case falls squarely within the purview of *Strate, Wilson,* and *Austin's*

Express. The Crow Tribal Court does not have jurisdiction to adjudicate tort claims arising out of the accident at issue merely because the injured tribal member and the alleged tortfeasor had a social relationship.

Long Warrior next argues that because the right-of-way was granted by the owner of the allotment, Jean Paul Rides Horse, and not taken by the government, no Crow Tribal governmental interest was conveyed and te Crow Tribe retains its jurisdiction over the land. Neither *Strate* nor *Wilson* make any distinction between rights-of-way which have been granted by the landowner versus rights-of-way which have been taken. As Boxx also notes, Long Warrior has cited no authority for her contention.

Long. Warrior also argues that Congress has expressly granted tribes concurrent jurisdiction over the regulation of intoxicating liquors on a reservation. 18 U.S.C. Section 1161. This includes regulation of liquor used by non-Indians on lands owned by non-Indians. *United States v. Mazurie*, 419 U.S. 544, 557 (1975). Long Warrior contends that since the tribe has jurisdiction to regulate intoxicating liquors, it follows that the tribe has jurisdiction over a cause of action arising in part from the violation of tribal liquor laws. Long Warrior concludes that because the authority to regulate exists on non-Indian land as well as Indian land, the status of the right-of-way is immaterial.

Boxx responds that a grant of concurrent jurisdiction to the tribes over regulation of intoxicating liquor on the reservations, pursuant to 18 U.S.C. Section 1161, does not vest the tribal court with jurisdiction over a civil cause of action where one or more of the parties may have been drinking. Express congressional delegation is required to expand the civil jurisdiction of a tribe. *Montana*, 459 U.S.

at 564. Plaintiff argues that 18 U.S.C. Section 1161 does not contain an express delegation of jurisdiction over civil actions. This Court concurs.

Finally Long Warrior contends that the tribe has inherent authority to adjudicate the tort action arising out of the accident because alcohol-related accidents satisfy the second exception set out in *Montana*; matters that affect the health, safety, or political integrity of the tribe. *Strate* and *Wilson* both recognize that negligent driving on a highway right-of-way through a reservation does not satisfy the second *Montana* exception. It is immaterial that alcohol may have been the cause of, or contributed to, such negligent driving.

Based upon the foregoing IT IS HEREBY ORDERED that plaintiff's motion amend order and judgment is GRANTED. The Court's judgment entered August 19, 1999 is VACATED.

IT IS FURTHER ORDERED that defendant's motion to dismiss is DENIED.

IT IS FURTHER ORDERED that plaintiff's motion for summary judgment is GRANTED. The Crow Tribal Court lacks jurisdiction to entertain and decide *Heather Long Warrior v. Michael Boxx*, CV 97-241, or subject Boxx to further proceedings therein.

IT IS FINALLY ORDERED that Heather Long Warrior is permanently enjoined from proceeding with Heather Long Warrior v. Michael Boxx, CV 97-241, in Crow Tribal Court.

The clerk shall forthwith notify the parties of the making of this Order.

DONE and DATED this 10th day of Dec. 1999.

Jack D. Shanstrom
Chief United States District Judge

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-35073

MICHAEL BOXX, Plaintiff-Appellee
vs.
HEATHER LONG WARRIOR, Defendant-Appellant

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA

[Filed November 20, 2001]

Before: Pregerson, Tashima, and Thomas, Circuit Judges

ORDER

The opinion filed on September 6, 2001 is amended by adding a new footnote 3 at the end of Part II.C, slip op. at 12564, 265 F.3d at 771, as follows:

> 3. Long Warrior's reliance on *Sanders v. Robinson*, 864 F.2d 630 (9th Cir. 1988), is misplaced. First, *Sanders* is a domestic relations case, and domestic relations has long been been an area excepted from federal jurisdiction. *See Ankenbrandt v. Richards*,

504 U.S. 689, 693 (1992). Second, *Sander's* holding that tribal courts had jurisdiction over dissolution proceedings of that marriage was based on the fact that the family unit (the couple and their children) resided on the reservation and that all three children were members of the tribe. Thus, *Sanders* has no application to the casual relationship in the case at bench.

Former footnote 3 is renumbered as footnote 4.

With the above amendment, the panel has voted to deny the petition for panel rehearing and for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on en banc rehearing. *See* Fed. R. App. P. 35(b).

The petition for panel rehearing and the petition for rehearing en banc are denied.